Supreme Court, U.S.
FILED
APR 15 1998
CLERK

(2)

No. 97-1516

In The

Supreme Court of the United States

October Term, 1997

DALRIE A. BERG, D.O.,

Petitioner,

v.

JACK SHAPIRO, HUMANA HOSPITAL MOUNTAIN VIEW, INC., JOHN A. HOFFMAN, THOMAS J. BLANCHARD and DOES 3 through 10,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Colorado

BRIEF OF RESPONDENTS JACK SHAPIRO, HUMANA HOSPITAL MOUNTAIN VIEW, INC., JOHN A. HOFFMAN, THOMAS J. BLANCHARD AND DOES 3 THROUGH 10, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER J. LUCAS*
L. RICHARD FREESE, JR.
CATHERINE A. G. SPARKMAN
DOHERTY, RUMBLE & BUTLER, P.C.
1200 Seventeenth Street
Denver, Colorado 80202
(303) 572-6200

**Counsel of Record for Respondents*

Counsel for Respondents Jack Shapiro, Humana Hospital Mountain View, Inc., John A. Hoffman, Thomas J. Blanchard and Does 3 Through 10

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 pp

QUESTION PRESENTED FOR REVIEW

Respondents respectfully restate Petitioner's Question Presented for Review. The issue, succinctly stated, involves whether peer review activities of Respondent Humana Hospital Mountain View, Inc., a private hospital, and the other Respondents, who are members of its staff and peer review committee, constitute state action sufficient to permit Petitioner's claim based on 42 U.S.C. § 1983. Contrary to Petitioner's suggestion, the Supreme Court of the State of Colorado has never concluded that peer review committees are arms of the state, and has expressly declined to so hold.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are the Petitioner, Dalrie A. Berg, D.O., and the Respondents Jack Shapiro, Humana Hospital Mountain View, Inc., John A. Hoffman, Thomas J. Blanchard, and Does 3 through 10, who are unknown parties who allegedly participated in the peer review activities affecting Petitioner.

RULE 29.6 LISTING

Humana Hospital Mountain View, Inc. is now owned by Columbia-HealthOne, LLC and is called "Columbia North Suburb Medical Center." The managing member of Columbia-HealthOne, LLC is Columbia/HCA of Denver, Inc., whose owner is Columbia/Rose Health System, Inc. Galen Health Care, Inc. is the owner of Columbia/Rose Health System, Inc. Western Plains Regional Hospital, Inc., owns Galen Health Care, Inc. Columbia/HCA Healthcare Corp. owns Western Plains Regional Hospital, Inc. Humana has no non-wholly owned subsidiaries

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASON FOR DENYING THE WRIT	8
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES:

Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777 (1982) 9

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 16, 17

Evans v. Newton, 382 U.S. 296 (1966) 17

Goss v. Memorial Hospital System, 789 F.2d 353 (5th Cir. 1986) 12

Loh-Seng Yo v. Cibola General Hospital, 706 F.2d 306 (10th Cir. 1983) 9

Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) 8

Modaber v. Culpeper Memorial Hospital, 674 F.2d 1023 (4th Cir. 1982) 12

Nicholas v. North Colorado Medical Center, 902 P.2d 462 (Colo. App. 1995) 13

North Colorado Medical Center v. The Committee on Anticompetitive Conduct, 914 P.2d 902 (Colo. 1996) 13

Patrick v. Burget, 486 U.S. 94 (1988) 14

Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 205 (1982) 8, 9, 16

Shulman v. Washington Hospital Center, 222 F. Supp. 59 (D.D.C. 1963) 9

Sokol v. University Hospital, Inc., 402 F. Supp. 1029 (D. Mass. 1975) 15

Sosa v. Managers of Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 1971) 10

TABLE OF AUTHORITIES – Continued

Page

Tunca v. Lutheran General Hospital, 844 F.2d 411 (7th Cir. 1988) 12

Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973) 15

West v. Atkins, 487 U.S. 42 (1988) 17

Wong v. Tripling, 881 F.2d 200 (5th Cir. 1989) 11

STATUTES AND RULES:

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 11101 10

42 U.S.C. § 11112 5

Section 12-36.5-101 *et seq.*, C.R.S. 11

Section 12-36.5-103, C.R.S. 11

Section 12-36.5-104(14), C.R.S. 14

Section 12-36.5-106, C.R.S. ..... *passim*

Section 12-43.5-101 C.R.S. (L.75, p. 465, § 1 *repealed*, S.B.261, eff. July 1, 1989) 10, 11

STATEMENT OF THE CASE

Respondents reiterate that the question before this Court deals solely with an issue of law: whether peer review activities conducted by a private hospital of its hospital staff pursuant to its own bylaws, protocols and procedures constitute state action for purposes of 42 U.S.C. § 1983. In the proceedings below, Petitioners did not challenge the trial court's findings that Respondents acted with due process and fair procedure in resolving the complaints against him of inadequate professional conduct in his obstetrical practice of Humana. Nor did Petitioner challenge the trial court's conclusions of law that peer review immunity statutes should be applied and that Petitioner's claims should be dismissed because Respondents were immune from suit under those statutes. Petitioner brings forward only the issue of whether he could maintain an action against Respondents under § 1983 of the Federal Civil Rights Act.

Nevertheless, Dr. Berg's petition for certiorari is replete with allegations from his complaint against Respondents which have no basis in the record, or in the trial court's extensive findings of fact and conclusions of law entered at the conclusion of the evidentiary hearing held to address Respondents' defense of immunity under the Colorado and Federal statutes.

As found by the trial court, the facts upon which this case rest are as follows:

Late in the evening of June 10, 1992, or early in the morning of June 11, 1992, one of Dr. Berg's patients, referred to as H.P., was admitted to Humana ready to deliver her baby. On June 11, 1992, Nurse Mowers, one of

the attending nurses, submitted to Humana an "Occurrence Report" regarding the delivery of H.P.'s child. The Occurrence Report stated that Dr. Berg was in the delivery room at the time the child was being spontaneously delivered by the patient and that Nurse Mowers made repeated suggestions to Dr. Berg that he needed to attend to the patient, which he refused to do. Nurse Mowers was required to deliver the child herself. The Occurrence Report also stated that Dr. Berg administered Methergine by intravenous push and that Dr. Berg did suturing on a uterine tear without anesthesia. H.P. repeatedly complained of discomfort during the procedure, yet Dr. Berg refused to administer anesthesia which was offered by Nurse Mowers.

At the start of the business day on June 12, 1992, action commenced with respect to the Occurrence Report. The Occurrence Report was reviewed and considered by Dr. Branstetter, the head of the Department of Obstetrics, Dr. Blanchard, the deputy head of the Department of Family Practice, Mr. Hoffman, Humana's assistant administrative director, and Dr. Haffey, the chief of the medical staff. Both Dr. Branstetter and Dr. Blanchard stated to Dr. Haffey, in writing, that it was their opinion that summary suspension of the obstetric privileges of Dr. Berg was required. Following discussion among the medical staff, Dr. Haffey, in his capacity as the chief of the medical staff, imposed a summary suspension of Dr. Berg's obstetrical privileges at Humana pending further investigation. The trial court found that the "[a]ction was taken by [Dr.] Haffey under circumstances where failure to take such action might have resulted in imminent danger to the health of any individual." The trial court also concluded

that the summary suspension of Dr. Berg's obstetrical privileges was taken with the reasonable belief that the action was in furtherance of quality health care and after a reasonable effort to obtain the facts of the matter.

Immediately following the summary suspension, Dr. Berg received notice of his right to an informal hearing pursuant to Section 9.3.2 of Humana's bylaws. The notice identified several cases where Dr. Berg had encountered medical problems in addition to the case involving H.P. Dr. Haffey quickly appointed an *ad hoc* investigating committee composed of three medical staff physicians. The *ad hoc* investigating committee and Dr. Berg received advance notice of the matters which were to be considered and the *ad hoc* investigating committee discussed the matters with Dr. Berg "at length." The *ad hoc* committee also interviewed Nurse Mowers.

The *ad hoc* investigating committee prepared a written report to the Medical Staff Executive Committee recommending that the summary suspension should be removed, but that Dr. Berg be placed on probation with certain educational and related conditions. Prompted by the report, the Medical Staff Executive Committee decided to remove the summary suspension of Dr. Berg's obstetrical privileges on the conditions that Dr. Berg enter into a continuing educational program and agree to supervision of his obstetrical practice at Humana. Dr. Berg, who was present at the Executive Committee meeting, chose not to respond spontaneously to the Executive Committee's action, but, rather, indicated that he would contact his attorney. After seeking the advice of his attorney, Dr. Berg signed a written agreement dated July 1,

1992 which agreed to those two conditions of his continuing to practice obstetrics at Humana. The trial court found, as a matter of fact, that Dr. Berg's execution of the agreement negated any need for further actions or hearings by Humana under its bylaws.

After waiting for about five or six weeks, Dr. Berg advised Humana that he had decided not to comply with the agreement of July 1, 1992, and instead requested the matter to be reopened and that formal peer review proceedings under the bylaws be instituted. There was no obligation under the bylaws for the Medical Staff Executive Committee to reopen the matter, since as found by the trial court, Dr. Berg had entered into a binding agreement terminating the peer review process. Nevertheless, Dr. Berg withdrew that request before the Executive Committee could act on it. The trial court found that Dr. Berg was fully familiar with his rights under Humana's bylaws, particularly because he was chairman of a standing medical staff "By-Law Committee." The trial court, thus, concluded that Dr. Berg's withdrawal of his new request for hearing was fully voluntary and knowing, and was a firm reason for Humana not to proceed with Dr. Berg's peer review process further.

Dr. Berg changed his mind again, however, and at his request, he was permitted to address the Medical Staff Executive Committee on September 8, 1992. At the Executive Committee meeting, one of the physicians on the Committee reported that Dr. Berg had advised him prior to the meeting that he no longer wished to practice obstetrics at Humana; however, no written resignation had been received. Thus, after hearing from Dr. Berg and subsequent deliberation, the Executive Committee asked

for Dr. Berg either to resign his obstetrical privileges at Humana in conformity with his prior statement, or his obstetrical privileges would be suspended. After consultation with his attorneys, on September 9, 1992, Dr. Berg resigned his obstetrical privileges, which the trial court found was "a voluntary act on the part of Dr. Berg to the extent that his free will to make a choice was not overcome by the conduct of the hospital or any other of the defendants in this case." Again, the trial court found that due to Dr. Berg's voluntary resignation of his obstetrical privileges, further hearing or other proceedings under Humana's bylaws were neither expected nor required.

However, Dr. Berg went back and forth thereafter, changing his mind several times over the period of September and October of 1992. During this period, Humana offered to reinstate Dr. Berg's obstetrical privileges under the terms which Dr. Berg had negotiated and agreed to in the July 1, 1992 agreement. Finally, after negotiations between his counsel and Humana's attorneys, Dr. Berg resigned his privileges once and for all by a letter dated October 30, 1992. The trial court again found that Dr. Berg's actions caused Humana not to move forward with its formal hearing procedures under its bylaws.

In its conclusions of law, the trial court concluded that the elements of the immunity statute (42 U.S.C. § 11112) had been satisfied, specifically as follows:

> (1) The summary suspension of Dr. Berg's obstetrical privileges at Humana was taken under circumstances where failure to act may have resulted in imminent danger to the health of any individual;

> (2) The actions were taken in the reasonable belief that the actions were in furtherance of quality health care;
>
> (3) At each step of the proceeding, the action was taken after reasonable efforts were taken to obtain the facts. In connection with activities of the *ad hoc* committee, Dr. Berg was given "every opportunity to explain himself or discuss the matters";
>
> (4) Humana's actions were taken after procedures which afforded adequate notice and hearing to Dr. Berg and such procedures were fair to Dr. Berg; and
>
> (5) Humana's actions were made in the reasonable belief that they were warranted by the facts.

The trial court concluded that the elements of the Colorado immunity statute had also been satisfied:

> (1) The actions were taken after a reasonable effort to obtain the facts of the matter upon which action was to be taken;
>
> (2) The actions were taken with a reasonable belief that the actions taken were warranted by the facts; and
>
> (3) The actions were taken in good faith within the scope of the professional review committee process.

The substandard obstetrical practice of Dr. Berg did not escape notice of the Colorado State Board of Medical Examiners. On June 14, 1995, the Colorado Attorney General initiated a formal complaint against Dr. Berg. An amended complaint was filed by the Colorado Attorney

General on August 31, 1995. The amended complaint set forth eight specific cases, including patient H.P., in which Dr. Berg had failed to act properly. The Attorney General alleged that Dr. Berg committed an act or omission constituting gross negligent medical practice or two or more acts or omissions which failed to meet generally accepted standards of medical practice.

On the eve of a hearing on the formal charges before the State Board, Dr. Berg entered into a Stipulation and Final Agency Order with the Attorney General. Pursuant to that Stipulation, Dr. Berg agreed that, in the absence of his presenting adequate evidence to the contrary, there was sufficient evidence to establish a prima facie case of two or more acts or omissions by him which failed to meet generally accepted standards of medical practice. Dr. Berg also agreed that he would not thereafter engage in any form of obstetrical practice. Dr. Berg further agreed that his medical license to continue to practice as a general practitioner (but not as a specialist in obstetrics) was to be placed on probationary status for a period of five years. During the probationary period, Dr. Berg agreed to be monitored by a "practice monitor."

At the evidentiary hearing, the trial court declined to admit portions of a report prepared by Somerville & Associates, a team of consulting psychologists, concerning management matters at Humana. The Court of Appeals reversed the trial court's evidentiary finding, holding that the Somerville Report was not protected by Colorado's psychologist-client privilege statute and remanded the case for further proceedings consistent with its ruling on admissibility and privilege. Contrary to Petitioner's assertions, no part of the Court of Appeals

ruling deals with the issue of immunity or good faith, only that the Somerville Report is not protected by the psychotherapist-client privilege. No ruling was made as to the veracity or relevance of the report; admissibility of the report remains the purview of the trial court upon remand.

REASONS FOR DENYING THE WRIT

THE CONDUCT OF PEER REVIEW ACTIVITIES BY A PRIVATE HOSPITAL'S GOVERNING BODY OF ITS OWN MEDICAL STAFF DOES NOT CONSTITUTE STATE ACTION TO SUPPORT PETITIONER'S CLAIMS UNDER 42 U.S.C. § 1983.

A. Peer Review has not traditionally been the exclusive prerogative of the state

42 U.S.C. § 1983, enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment, prohibits interference with federal rights under color of state law. The issue before this Court is whether Humana's action, as a private hospital, in temporarily suspending Dr. Berg's hospital privileges, is state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2745, 73 L.Ed.2d 482 (1982). Unless state action is involved, no constitutional rights are implicated and no claim under § 1983 exists. *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 205 (1982). If the action of Humana is not state action, the inquiry ends.

By strained statutory interpretation and facile but fallacious logic, petitioner attempts to bootstrap the conduct of professional review activities into state action and

a private hospital into a division of the Colorado Board of Medical Examiners. Petitioner's position is not supported by history, precedent or sound reasoning. Evaluation of the competency and qualifications of staff physicians for purposes of achieving the highest medical practice standards, patient safety and quality patient care has long been a prerogative of private medical institutions. Using the fruits of peer review activities to assist the Colorado Board of Medical Examiners in the discharge of its licensing and oversight functions does not convert an historically private function into state action. The existence of a nexus between professional review organizations and the Colorado Board of Medical Examiners' disciplinary process does not make the former an instrumentality of the latter.

This Court has established the parameters for determining whether state action exists: "We have held that the question [of state action under § 1983] is whether the function performed has been 'traditionally the *exclusive* prerogative of the State'" [Court's own emphasis]. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 2772, 73 L.Ed.2d 205 (1982). This requirement is reaffirmed in *Blum v. Yaretsky*, 457 U.S. 991, 1011, 102 S.Ct. 2777, 2789 (1982). Case authority is both legion and uniform in holding that, because professional peer review at private hospitals has *not* traditionally been the *exclusive* prerogative of the state, peer review at private hospitals does not constitute state action. *See, e.g., Loh-Seng Yo v. Cibola General Hospital*, 706 F.2d 306, 307-08 (10th Cir. 1983).

Private hospitals have routinely engaged in peer review of their staff physicians for important private reasons. *See, e.g., Shulman v. Washington Hospital Center,*

222 F. Supp. 59, 64 (D.D.C. 1963). Therein the court remarked:

> "Necessarily hospitals endeavor to secure the most competent and experienced staff for their patients. Without regard to the absence of any legal liability, the hospital in admitting a physician or a surgeon to its facilities extends a moral *imprimateur* to him in the eyes of the public. Moreover, not all professional men have a personality that enables them to work at harmony with others, and to inspire confidence in their fellows and in patients. . . . It becomes indispensable, therefore, for every such institution to make choices as to whom it will admit to its portals." [Emphasis in original.]

A private hospital engages in peer review "so that it can have confidence in the competent and moral commitment of its staff." *Sosa v. Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971).

Peer review activities in Colorado have been traditionally private in nature. While the Board of Medical Examiners has historically enjoyed the exclusive authority and responsibility for *licensure* of physicians in the State, professional review activities for purposes of ascertaining physician qualifications and competence to *enjoy hospital privileges* has *never* been exercised by that state agency. As early as 1975, a decade before the enactment of the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et seq.*, the Colorado Legislature recognized the value of encouraging discipline and control of the practice of health care rendered by physicians in hospitals by committees comprised of their peers. *See* Section 12-43.5-101 C.R.S. (L.75, p. 465, § 1 *repealed*, S.B.261, eff.

July 1, 1989). In fact, nowhere are professional review activities either claimed or exercised by any Colorado state agency. Certainly, then, the Colorado Board of Medical Examiners exercises no "exclusive" control over the private peer review process.

The current Colorado Professional Review Act (Colo.Rev.Stat. § 12-36.5-101 *et seq.*) does not change this historical and traditional deference. Section 12-36.5-103, C.R.S., expresses the intent of the General Assembly that the Board of Medical Examiners *utilize and allow* professional review committees and governing boards to *assist* it. This language does not delegate any authority to private peer review organizations, nor does it abrogate the Board of Medical Examiners' traditional exclusive functions concerning the licensure of physicians in this state.

Creating a statutory scheme whereby private hospitals can review the conduct practiced by its staff physicians and oversee the quality of medical care does not rise to state action just because there is some interrelationship between that private function and state regulatory or investigatory authority. In *Wong v. Tripling*, 881 F.2d 200 (5th Cir. 1989), a physician asserted a § 1983 claim against a private hospital for revocation of his staff privileges, claiming that there was state action because "Mississippi's comprehensive scheme governing the suspension, revocation or restriction of hospital staff privileges creates a program whereby hospitals perform a traditional state function," allegedly a peer review. *Wong*, 881 F.2d at 201-02. The Fifth Circuit affirmed the federal district court's dismissal of the physician's § 1983 claim

for lack of state action, holding that "the hospital's executive committee did not perform a traditional state function in revoking Dr. Wong's staff privileges." Similarly, in *Goss v. Memorial Hospital System*, 789 F.2d 353, 356 (5th Cir. 1986), the Fifth Circuit held that the Texas Medical Practice Act's provisions governing peer review did not create state action for purposes of § 1983. Just like the Colorado statute, the Texas Act "authorizes a medical peer review committee to report its finding of a physician's incompetency to the Texas State Board of Medical Examiners."

In *Tunca v. Lutheran General Hospital*, 844 F.2d 411 (7th Cir. 1988), the Seventh Circuit held that even a comprehensive statutory scheme requiring hospitals to develop procedural guidelines for considering applicants for medical staff privileges does not render the hospital a state actor for purposes of § 1983. The Fourth Circuit held, in affirming the dismissal of a physician's section 1983 claim, that where the state statute did not give a private hospital the authority to revoke a physician's medical license, the statute did not delegate to a private entity "powers exclusively reserved to the State." *Modaber v. Culpeper Memorial Hospital*, 674 F.2d 1023, 1027 (4th Cir. 1982). The Court reasoned:

> "The state does not make a hospital's decision to revoke privileges dispositive of license revocation. *The hospital makes its own decision for its own reasons.* Making it State action merely because it is reported to the medical licensing authority would be just as non-sensical as making a private employer's decision to fire a parolee State action because it is reported to the parole commission. In each case, the reasons for making the

> decision may be totally independent of the state's reason for wanting the information. [Emphasis added.]

Petitioner's interpretation of *Nicholas v. North Colorado Medical Center*, 902 P.2d 462 (Colo. App. 1995), *aff'd sub nom, North Colorado Medical Center v. The Committee on Anticompetitive Conduct*, 914 P.2d 902 (Colo. 1996), is erroneous. First, Petitioner asserts that in *Nicholas* the Court of Appeals determined that when performing peer review activities the governing board is clothed with the status of a state (Petition for Certiorari, at page 11). *Nicholas* specifically did *not* reach that issue. The Court of Appeals expressly declined to decide if North Colorado Medical Center's governing board was a subordinate state agency to the Committee on Anticompetitive Conduct; rather, it upheld the complaining physician's standing to appeal on the alternative ground that C.R.S. § 12-36.5-106 itself expressly permitted the loser in a final administrative action before the Committee on Anticompetitive Conduct to appeal to the Colorado Court of Appeals.[1] The Court of Appeals had an opportunity to revisit its own opinion in *Nicholas* in this case, and it reaffirmed its holding that *Nicholas* is limited to questions of anticompetitive conduct and did not address peer review concerning any other matters, including "whether peer review on other than noncompetitive conduct should be deemed action taken under color of state law

---

[1] Significantly, the duties of the Committee of Anticompetitive Conduct, and C.R.S. § 12-36.5-106 under which the *Nicholas* proceeding was brought, solely involve a charge that the peer reviewers' conduct was anti-competitive. Dr. Berg has not alleged any anti-competitive conduct.

for 42 U.S.C. § 1983 actions." (Court of Appeals Opinion, at p. 4.)

Petitioner urges this Court to adopt an absurd statutory construction: Petitioner urges that, in response to a 1988 *antitrust* decision arising in Oregon,[2] the Colorado General Assembly determined to make a wholesale change to the peer review process, erase the historical distinction between private hospitals and public agencies, and declare all peer review activities of a private hospital "state action." Petitioner offers no legislative history or evidence of legislative purpose to support this assertion. But, even if the Colorado Legislature determined to mitigate this Court's opinion in *Patrick v. Burget, supra,* it adopted a more direct approach to insulate private peer review organizations from claims of antitrust, by enacting C.R.S. § 12-36.5-104(14) which declares such peer review organizations not to be unlawful conspiracies. That amendment, coupled with the enactment of the provisions establishing the Committee on Anticompetitive Conduct in § 12-36.5-106, reflects a legislative intent to deal exclusively with antitrust considerations affecting peer review activities, and not with any other traditional private peer review.

Under Petitioner's theory, every single medical staff decision made by a private hospital in Colorado would constitute state action. The General Assembly could not possibly have intended such a radical federalization of peer review at private hospitals when it amended the

---

[2] *Patrick v. Burget,* 486 U.S. 94 (1988).

Colorado Professional Review Act to create the Committee on Anti-competitive Conduct. Adopting such interpretation would charge the private sector with state action in the performance of functions historically considered private. *Ward v. St. Anthony Hospital*, 476 F.2d 671, 675 (10th Cir. 1973); *Sokol v. University Hospital, Inc.*, 402 F. Supp. 1029, 1031 (D. Mass. 1975).

In summary, there is no authority to support Petitioner's proposition that the assistance of a private professional review organization to a public agency transforms those activities into state action. The conduct of a professional peer review is not traditionally, historically or exclusively the prerogative of the State of Colorado. The relevant statutes create no substantive participation, supervision, authority or control by the Colorado Board of Medical Examiners into the private, internal functions of peer review organizations sufficient to elevate their conduct into the conduct of the Board of Medical Examiners itself.

B. A private hospital's peer review activities are neither an integral part of the operation of the Colorado Board of Medical Examiners nor indispensable to the discharge of its functions so that the activities assume the character of governmental action.

Petitioner's argument that Respondents' private peer review activities constitute state action has been rejected by virtually every court which has addressed the issue, because medical staff peer review has traditionally and historically been the prerogative of private hospitals and not the exclusive prerogative of the state. Thwarted by

the legion of authority on point against his position, Petitioner attempts to bootstrap his claim into state action by suggesting that Humana's private peer review activities are so entwined and impregnated by state action that they are in fact the actions of the Colorado Board of Medical Examiners under Petitioner's own flawed analysis of this Court's opinion in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Petitioner's argument is without merit. First, the appropriate test to measure Respondents' conduct, as rightly and consistently held by all courts which have addressed this issue, is whether the conduct complained of has historically been the exclusive prerogative of the state. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). Respondents have shown categorically that it is not. Second, the test enunciated in *Burton* and its progeny deals with circumstances on which the state participates in activities historically private in character. Defining state action in such circumstances requires a determination, considering the aggregate of relevant factors, that the state has so far insinuated itself into an interdependence with private conduct that it has become a joint enterprise compelling the finding of state responsibility for private action. Thus, this Court held in *Burton*, that state action exists in an instance where the land and buildings in question were publicly owned, the property was dedicated to public use, the performance of the parking authority was declared to be an essential state function, and the acquisition, construction and maintenance of the facility were paid for by revenue bonds financed through proceeds from the operation of the facility.

Similarly, in *Evans v. Newton*, 382 U.S. 296 (1966), another case cited by Petitioner, this Court determined that the status of the city as trustee of a private park which was an integral part of the city's activities, maintained by city personnel and funds, and exempted from city taxation, demonstrated a governmental control sufficient to constitute state action. In *West v. Atkins*, 487 U.S. 42 (1988), yet another case cited by Petitioner, this Court held that the actions of private physicians hired by the state of North Carolina to provide medical treatment of inmates of its prisons were agents of the state because (1) the state had a federal constitutional obligation under the Eighth Amendment to provide adequate medical care to those to whom it had incarcerated; (2) the state hired physicians to fulfill its constitutional obligation; (3) inmates must rely solely on those physicians provided by the state for their medical needs; and (4) the physicians function within the state system in rendering medical care and treatment. While the *Burton* analysis may be appropriate to test a single, historically private activity (such as operating a parking garage, or managing a park, or providing medical treatment to inmates), it is inapplicable in circumstances where the totality of private conduct is challenged as state action and where such private conduct has never been the exclusive prerogative of the state.

However, even if the rule in *Burton* and its progeny were applied here, the conduct of Respondents do not constitute state action because the totality of aggregate facts here do not support the finding of an intertwined or symbiotic relationship between private peer review organizations and the Colorado Board of Medical Examiners

so that the former takes on the governmental character of the latter. The fact that the Colorado Peer Review Act declares that private hospitals *may* establish peer review organizations, governed by their own bylaws, and administered by their own internal governing bodies, and the fact that such peer review activities are immunized if they are conducted in accordance with the principles of good faith and procedure, does not constitute the take-over of private peer review by the State of Colorado.

CONCLUSION

Petitioner's argument that the Colorado Peer Review Act converts historically and traditionally private hospital peer review activities into state action is without merit. Peer review activities have been traditionally, historically and exclusively a private function of hospital-governing bodies. They are used, encouraged and even relied upon by the Colorado Board of Medical Examiners. However, that does not convert these private governing boards and private peer review organizations into arms of the state, subjecting every decision they make to

federal civil rights scrutiny. Petitioner's request for a writ of *certiorari* should be denied.

Respectfully submitted,

PETER J. LUCAS*
L. RICHARD FREESE, JR.
CATHERINE A. G. SPARKMAN
DOHERTY, RUMBLE & BUTLER, P.C.
1200 Seventeenth Street
Denver, Colorado 80202
(303) 572-6200

**Counsel of Record for Respondents*

Counsel for Respondents Jack Shapiro, Humana Hospital Mountain View, Inc., John A. Hoffman, Thomas J. Blanchard and Does 3 Through 10